Supreme Court U.S.
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No. 02-836

IN THE

Supreme Court of the United States

DONALD W. STEARNS, on Behalf of Himself and All Others Similarly Situated,

Petitioner,

v.

NCR CORPORATION and NCR HEALTH CARE PLAN FOR RETIRED EMPLOYEES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS ACTUALLY PRESENTED

1. Did the Court of Appeals correctly hold that the early retirement program offered by NCR Corporation was not a separate plan under the Employee Retirement Income Security Act of 1974 ("ERISA") but instead was incorporated by amendment into NCR's general health-care plan?

2. Did the Court of Appeals correctly hold that the contract between each early retiree and NCR included the relevant provisions of NCR's general health-care plan including its reservation of the right to amend or terminate any benefit?

3. Did the Court of Appeals correctly hold that, under all the relevant contractual provisions, including the reservation of rights, NCR did not agree that the early retirees' health-care benefits would be vested and inalterable?

The two questions that petitioner Stearns purports to present do not arise from the Court of Appeals' decision.

First, the Court of Appeals did not hold that a contract claim cannot be validly stated under ERISA. Instead, the Court of Appeals held that under ERISA any contract affecting benefits includes all pertinent provisions of the employer's health-care plan.

Second, the Court of Appeals did not hold that a contract affecting ERISA benefits should not be construed under federal common law principles. It held instead that the governing federal law includes ERISA principles as well as contract law.

STATEMENT PURSUANT TO RULE 29.6

NCR Corporation has no parent corporation, and no publicly held company owns 10% or more of NCR's stock.

NCR Heath Care Plan for Retired Employees (the correct name for the other respondent) is a group welfare benefits plan under ERISA which is sponsored and completely controlled by NCR.

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Respondents NCR Corporation and NCR Health Care Plan for Retired Employees (referred to collectively as "NCR") ask the Court to deny the petition because this case has been decided correctly based upon its undisputed facts and well-established ERISA principles, and the Eighth Circuit's ruling does not conflict with any other Circuit's decision. Petitioner Stearns tries to create the impression of a Circuit conflict by mischaracterizing the Eighth Circuit's holdings and ignoring the key undisputed facts of this case. Most importantly, the petition makes no reference whatever to NCR's written reservation of the right to amend or terminate any health-care benefit provided to its active and retired employees even though that reservation of rights was the decisive factor for the Court of Appeals. Stearns' failure to discuss the core issue in the case in itself requires denial of his petition.

COUNTER-STATEMENT OF THE CASE

A. Facts

Early Out Program

Plaintiff and his class are former NCR employees who retired effective January 1, 1994, under NCR's Enhanced Retirement Program ("Early Out Program"). Through this voluntary program for NCR employees aged 50 or older and with ten years of service by December 31, 1993, plaintiff and the other class members received enhanced pension and life insurance benefits that they would not have received had they retired outside this program.[1]

1. All participating retirees received pensions that were not actuarially reduced for early retirement, as they would have been absent this program, as well as an irrevocable $30,000 lump-sum (Cont'd)

The health care portion of the Early Out program enabled retirees aged 50-54 to receive health care coverage to which they otherwise would not have been entitled, and participants aged 55-61 received more favorable coverage than they would have received if they had retired outside that program.[2]

(Cont'd)
cash payment. In addition, retiring employees aged 50 through 54 were able to retire and immediately commence their unreduced pensions even though retirement eligibility normally began at 55. All these pension benefits immediately vested and were not subject to change.

Early Out participants also received improved life insurance benefits. Retirees aged 50 through 54, who would have otherwise received no life insurance upon retiring, were given at least $5,000 in coverage and up to $10,000 depending upon years of service and salary. Older retirees received substantially higher coverage than they would have received absent the Early Out program. These life insurance benefits are subject to NCR's reserved right to change or terminate welfare benefits, but in fact these benefits have not been changed.

2. For example, those qualified participants aged 50 through 54, who would have had no NCR health care benefits whatever if they had retired outside the Early Out program, became eligible to participate in the NCR Health Care Plan's "80/20" benefit option as well as NCR's prescription drug plan. Participants aged 55 through 61 became eligible for the "90/10" benefit option instead of the "80/20" coverage they would have received if they had retired outside the Early Out program; they were eligible for the prescription drug plan whether or not they participated in that program. The health care benefits of an Early Out participant aged 62 or above, however, did not differ from the coverage available to NCR employees retiring outside that program. Those aged 62 through 64 were already entitled to "90/10" coverage and the prescription drug plan. Once they reached age 65, Early Out participants, like all NCR employees and participating retirees, were entitled only to the Supplemental Plan to Medicare ("MedSupp").

NCR's Reservation of Rights To Amend or Terminate the Early Out Retirees' Health Care Benefits

The NCR Group Benefits Plan in effect in 1993 explicitly stated for both active and retiree health care coverage that:

> PLAN AMENDMENT. The Company [NCR] reserves all rights at any time or from time to time to amend the Plan in whole or in part, including the right to make any amendments to a contract with an Insurance Company, and the right to amend any rules adopted by the Company for the administration of the Plan. No retroactive amendment shall be made unless required under ERISA, any other federal law or under any applicable regulation thereunder. The Company reserves the right to change or cancel the Plan, or any benefits under the Plan, at any time. If the Company cancels the Plan or any benefits under the Plan, participation in the cancelled benefits would end on the date of cancellation.

Information Provided by NCR to Eligible Employees

NCR employees eligible for the Early Out program were required to decide whether to participate by December 17, 1993. During the approximately 10-week period after the announcement of the program on October 1, 1993, until the deadline for participation, NCR provided information about the program to prospective participants on several occasions and each time advised its eligible employees that participants' health care benefits would remain subject to NCR's reserved right to modify them.

1. Early Out Program Questions and Answers Guide.

The "Questions and Answers Guide" provided a chart outlining the Early Out Program's health care benefits and specifically stated, in bold print, that:

> ***Your*** [sic] ***should refer to our "Group Benefits Plan" booklet which was mailed to your home earlier this year for the details of the NCR Health Care Plans. The NCR Health Care Hotline (administered by Prudential Insurance) 1-800-543-0475 is also available to answer your questions.***

The Guide's descriptions of the Early Out Program's health care provisions incorporated word-for-word the language used in the 1993 Group Benefits Plan comparing the benefits offered under various coverages detailed in that Plan, such as the calendar year deductible, annual out-of-pocket maximum payment levels, and lifetime maximum out-of-pocket payments. Thus, the Early Out Program's health care benefits were directly derived from the existing NCR Health Care Plan.

2. Early Out Program Seminars.

In addition to the Guide, NCR used seminars to explain the Early Out Program and answer questions that eligible employees might have. Participants in the seminar, including class representative Stearns, were provided with materials containing the following statement:

Retirement Planning Seminar

The following information includes unofficial summaries of selected NCR Corporation benefit plans. As with any plan summary, the official and controlling provisions of the plans are contained in the plan documents. *The company reserves the right to amend or terminate any of the plans at any time.* In case of any differences, the plan documents will govern. (Emphasis added)

3. Closed-Circuit Television Broadcast.

On November 30, 1993, NCR had a Company-wide closed-circuit television broadcast during which NCR personnel answered questions from eligible employees concerning the Early Out Program's health care coverage. In response to one such question, the NCR spokesperson stated that:

Our intent when we set up these programs was to continue them in a way that is similar to the actives. *Unfortunately, given the long time horizon, we can't promise that could go on forever.* There's a lot of factors that will intervene—not the least of which is the current national health care debate which could influence the kind of benefits we offer; and it's a very costly benefit to maintain, and we are trying to do everything we can. We understand that these are important issues for everybody and we are working hard to provide the best benefit we can for the long term. (Emphasis added)

In addition, charts were used during the presentation to explain the Early Out Program's health care coverage, and each chart explicitly stated that such coverage was "[s]ubject to plan changes."

4. NCR Newsline Special Edition.

Shortly before the Early Out program's deadline for participation, NCR sent out to all employees a "Special Edition" of its internal newsletter, "NCR Newsline," which included the following "Q and A" with respect to the Program:

> **Q: Is there any guarantee that the health care plan for active associates and retirees won't change?**
>
> A: While NCR would like to be able to "guarantee" health care coverage, this is not realistic given the environment in which we run our business. However, it is NCR's intent to continue to *separately* assess the competitive positions of our active associate and retiree health care plans and to maintain the competitiveness of these plans (including periodic reviews of health care schedules established for each plan). (Emphasis in original)

Plaintiff's "Election"

On December 14, 1993, plaintiff Stearns signed the one-page "Election To Volunteer for the Enhanced Retirement Program and Release of Claims." The "Election" states that:

> After considering my personal situation, I elect to retire under the terms of the Enhanced Retirement Program. I have reviewed and understand the terms of the Program and this Election Form. I understand that by retiring under the Enhanced Retirement Program I am entitled to a package of benefits that exceeds the benefits that I would normally receive.

By signing the Election, Stearns acknowledged that he had sufficient time to consider the Election Form and to have any questions about the program answered, that he had been advised by NCR to consult with an attorney before signing the Form, and that he understood that he will not be eligible for any other benefits. Stearns also released any claims that he may have had against NCR.

Subsequent Changes Made to NCR Group Health Plan without Early Retiree Objection

On several occasions after the Early Retirement Program took effect on January 1, 1994, NCR amended its Group Health Plan by changing the available benefits. These changes, both favorable and adverse, were made applicable to Early Out Program participants, but no Early Out Program participant objected. The governing Plan document throughout the period after the Early Out participants retired continued to reserve NCR's right to alter or cancel any available benefits or the Plan itself.

The 1999 Amendments

In September 1998, NCR informed retirees of further changes in their health care benefits effective January 1, 1999.

These changes applied equally to employees and retirees. All retirees, including Early Out Program participants, would be required to pay a portion of the costs of the medical benefits provided by NCR:

- Participants would be required to pay a premium equal to 10% of the cost for individual coverage and 30% of the cost for spousal coverage.

- Deductibles and annual out-of-pocket maximum payment levels would be increased.

- An emergency room co-payment would be established equal to $50 for each visit, but such co-payment is waived if the beneficiary is admitted to the hospital.

- The co-payment for the mail-order prescription drug program would be increased from $5 to $10 for generic drugs and from $10 to $20 for brand-name drugs.

- The MedSupp Plan would no longer be available to retirees unless they were age 64 as of December 31, 1998.

PROCEEDINGS BELOW

Stearns filed suit on November 4, 1998, on behalf of himself and "all NCR retired employees who retired under the 'USG Enhanced Retirement Program 1993.'" The Complaint asserted three claims: (1) for enforcement of the applicable Employee Retirement Income Security Act of 1974 ("ERISA") plan under 29 U.S.C. § 1132(a)(1)(B), (2)

for breach of contract under federal common law and ERISA based upon the retirees' acceptance of the Early Out Program, and (3) for breach of fiduciary duties under 29 U.S.C. §§ 1132(a)(3) and 1109(a).

On September 17, 1999, the District Court certified a class of persons who retired on December 31, 1993, pursuant to NCR's early retirement program and who were not yet 64 years of age on December 31, 1998. *Stearns v. NCR Corp.*, 1999 U.S. Dist. LEXIS 14776 (D. Minn. Sept. 17, 1999)

On May 17, 2000, on cross motions for summary judgment, the District Court rejected Stearns' claim for ERISA plan enforcement because it found that the Early Out Program was not a separate ERISA Plan; instead the Court concluded on undisputed facts that "the 1993 Plan was amended to incorporate the terms of the Early Out Program." The District Court also held that there was no basis for dispute that NCR's reservation of rights in the 1993 Group Benefits Plan applied to retirees as well as active employees. *Stearns v. NCR Corp.*, 57 F. Supp. 2d 954, 957-961 (D. Minn. 2000); Appendix to Petition ("App.") 18a-29a.

However, the District Court granted summary judgment to plaintiff on his breach of contract claim. The Court held that the one-page Election and Release was a bilateral contract between plaintiff and NCR that was incorporated into NCR's ERISA plan. The District Court also held that the Election itself did not reserve NCR's right to amend or cancel the health care benefits provided under the Early Out Program and that any ambiguity on the issue whether NCR's reservation of rights in its ERISA plan applied to the Early Out Program must be construed against NCR. The Court acknowledged that the Election also did not spell out the

Early Out Program benefits; that NCR's communications about the Program referred eligible employees to the 1993 Group Benefits Plan booklet for information about those benefits; and that the referenced booklet did contain NCR's reservation of rights. Nevertheless, the Court concluded that the communications were insufficient as a matter of law to bind the participating employees to that reservation of rights and that even though the Election contained no vesting or "lifetime" language, the participating employees' health-care benefits were vested. *Id.* at 961-967; App. 29a-41a.[3]

The Court of Appeals affirmed the District Court's decision that the Early Out Program is not a separate ERISA Plan. However, it reversed the District Court's decision that NCR had contractually agreed that the Program participants' health-care benefits were vested and inalterable for their lifetimes. The Eighth Circuit held that the District Court had erred by treating the contract as separate from the provisions of NCR's general plan and, in particular, its reservation of rights, and also by applying contractual principles without considering applicable ERISA provisions and case law:

> If a facet is governed by ERISA, any dispute over the terms *of that benefit* must be resolved by looking to ERISA's statutory provisions and relevant case law. Claims for ERISA benefits are determined by construing the plan in toto, not a single document such as the Releases in isolation. To be sure, "basic principles of contract interpretation" are often relevant in construing an

3. Given this holding, Plaintiff's third claim for fiduciary breach was moot. *Id.* at 967; App. 41a-42a. Stearns waived the issue by not raising it on his cross-appeal.

> ERISA plan. But if the plan, properly construed, does not afford the benefits at issue, they may not be added to the plan by implication from an "independent bilateral contract." *Stearns v. NCR Corp.*, 297 F.3d 706, 710 (8th Cir. 2002); App. 8a-9a (emphasis in original).[4]

Because the Early Out Program had been incorporated into NCR's general health-care plan by formal amendment, NCR's reservation of rights applied to the participants' health-care benefits.[5] The Court of Appeals cited its prior decisions, as well as those of other Circuits, holding that "an unambiguous reservation-of-rights provision is sufficient without more to defeat a claim that retirement welfare plan

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4. Stearns' statement (Pet. 6-7) that the Eighth Circuit may have "mistakenly assumed that a breach of contract claim was not separately pled," is plainly wrong. The Court of Appeals referred explicitly to both claims. 297 F.3d at 709; App. 8a-9a.

5. Although not raising it as a "question presented" by his petition, Stearns appears to contend that the Early Out Program was not incorporated into NCR's general welfare plan. (Pet. 4-5) Both the District Court and Court of Appeals so held, and there is no factual basis for a contrary conclusion. The District Court pointed to the documentation through which NCR's general ERISA plan was amended on December 13, 1993, by its Board of Directors to incorporate the Early Out Program. The District Court also cited the NCR Plan Administrator's subsequent amendment of the 1993 Plan's Summary Plan Description, authorized by NCR's Board, to incorporate the terms of the Early Out Program. This documentation "eliminates any possible doubt that defendants incorporated the terms of the Early Out Program into the 1993 Plan as an amendment, rather than establishing the program as an independent plan." Consequently, Stearns could not "avoid the effects of the 1993 Plan disclaimer [*i.e.*, Reservation of Rights]." 97 F. Supp. 2d at 959; App. 22a-24a.

benefits are vested." 297 F.3d at 712 & n.3; App. 12a. If a reservation-of-rights provision is "facially ambiguous," then the court may use extrinsic evidence to determine whether vesting was intended. But if, as here, the provision is unambiguous, then "there must be an affirmative indication of vesting in the plan documents . . ." to overcome the reservation of rights and establish vesting. *Id.* Moreover, the fact that the reservation-of-rights provision set forth in the plan documents was not reiterated in the Early Out Program Election form did not create an inference of vesting, as the District Court had held:

> An intent to vest may not be implied from the fact that the Releases and the NCR documents explaining the Program did not address the vesting issue or cross-reference the Reservation of Rights provision. Indeed, not even the ERISA-mandated summary plan description need disclose that welfare plan benefits are not vested. *Id.*

The Court of Appeals denied Stearns' petition for rehearing *en banc* without comment or dissent.

REASONS FOR DENYING THE PETITION

I. The Petition Misstates the Grounds for the Court of Appeals' Decision.

The two questions that petitioner Stearns purports to present are based on a glaring misstatement of the Court of Appeals' decision.

First, Stearns claims that the Court of Appeals held that there can be no binding contract between an employer and

employee with respect to ERISA welfare benefits. To the contrary, the Court of Appeals specifically said that:

> Without question, there was a bilateral contract between NCR and each Program participant defining the terms under which those parties agreed to terminate their employment relationship. 297 F.3d at 710; App. 7a.

The Eighth Circuit reversed the District Court's decision not on the ground that there could be no valid contract within an ERISA welfare plan, but instead because the District Court had isolated the Election form as the only relevant contractual document. The Court of Appeals correctly ruled that any such contract under ERISA includes all pertinent provisions of NCR's general health-care plan.

Similarly, Stearns erroneously argues that the Court of Appeals gave undue weight to NCR's intent in construing the contract. Instead, the Court of Appeals properly emphasized NCR's written reservation of the right to amend or terminate any or all of the health-care benefits provided under its ERISA plan. 297 F.3d at 711-712; App. 11a-12a. Because of that provision, Stearns was required to present evidence establishing that NCR had agreed that the reservation of rights would not apply to the Early Out Program. Instead, the documentation explaining the Program referred to NCR's general plan, which includes the reservation of rights, and specifically stated that the health-care benefits provided to Early Out Program participants were subject to change.

The second question Stearns purports to raise is that the Court of Appeals refused to apply federal common law

principles in construing the contract. Again, that is simply not what the Eighth Circuit said:

> To be sure, "basic principles of contract interpretation" are often relevant in construing an ERISA plan. 297 F.3d at 710; App. 9a.

The Court of Appeals held, however, that the District Court had erred by divorcing its contract construction from NCR's entire ERISA welfare plan and also from "ERISA plan interpretation principles." 297 F.3d at 711; App. 9a. There was simply no reason in this case to use extrinsic evidence to construe the contract because NCR's reservation of rights is unambiguous and Stearns presented no evidence even suggesting that the reservation of rights does not apply to the Early Out Program. In any event, the extrinsic evidence unquestionably established that the health-care benefits provided under the Program were subject to change.

Stearns' petition not only attacks decisions that the Eighth Circuit never made, but it also does not properly challenge that Court's key holdings: (i) that the Early Out Program was incorporated into NCR's general plan and (ii) therefore the reservation of rights in the general plan also applied to that Program. Stearns makes but a fleeting reference to the incorporation issue (Pet. 4-5) and totally ignores the reservation of rights upon which the Court of Appeals based its decision. Consequently, the petition must be denied because it fails to raise the questions actually decided by the Court of Appeals.

II. The Eighth Circuit's Decision Does Not Conflict with Other Circuits' Rulings.

Once Stearns' distortions of the Court of Appeals' opinion are understood, it is clear that the Eighth Circuit's decision does not conflict with any other Circuit's decisions. Indeed, the Court of Appeals cited the leading decisions by other Circuits "requir[ing] clear expressions of an intent to vest welfare plan benefits and enforc[ing] unambiguous reservation-of-rights provisions." 297 F.3d at 712 n.3; App. 12a.[6]

The cases upon which Stearns relies do not conflict with the Eighth Circuit's decision in this case. *Frahm v. Equitable Life Assurance Society*, 137 F.3d 955, 957-958 (7th Cir. 1998), for example, rejected the plaintiffs' claims that their employer had entered into bilateral contracts with them providing for vested, lifetime health-care benefits. As the Eighth Circuit held in this case, the Seventh Circuit ruled that, although contracts vesting benefits are permissible under ERISA, none of the plaintiffs in fact had entered into such a contract. Also as the Eighth Circuit held here, the Seventh Circuit applied ERISA principles as well as contract law and explained that the governing federal common law was being developed "in ERISA's shadow." *Id.* at 958.

Stearns relies heavily on *Bock v. Computer Associates Int'l, Inc.*, 257 F.3d 700 (7th Cir. 2001), but that decision is

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6. The cases cited are *Int'l Union, UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir.1999); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 135- 36 (2d Cir.1999); *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.) (*en banc*), *cert. denied*, 524 U.S. 923 (1998); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993).

far afield from this case. *Bock* involved a corporate severance pay agreement for highly paid executives that determined how much they would be paid upon termination. The question raised was whether commission income should be included in the severance pay formula. The corporate general counsel submitted the draft agreement to the employees and told Bock before he signed the agreement that commissions were included. However, when Bock was terminated, his severance pay did not reflect his six-figure commission income. There was no reservation of rights by the employer. The Seventh Circuit viewed the contract as distinctly different from ERISA pension plans and akin to simple employment agreements. It thus applied "general contract principles" to determine the parties' intent. *Id.* at 704-705.

When the Seventh Circuit decided a case comparable to this one, its ruling was virtually identical to the Eighth Circuit's decision. In *Etherington v. Bankers Life & Cas. Co.*, 968 F.2d 1218 (7th Cir. 1992) (table), reported in full at 1992 U.S. App. LEXIS 22771, the Court held that the retirees' claim that the employer had reneged on health-care benefit promises was defeated by the employer's unambiguous reservation of rights in its ERISA plan. As Stearns similarly contends here, the retirees argued that the "contract" was limited to certain documents they had been given, but the Seventh Circuit held that all pertinent ERISA plan documents had to be considered. Moreover, the Court also held that, under applicable ERISA principles, statements by the employer in the documents that described the benefits but contained no language that those benefits could never be changed, did not vest the benefits. *Id.* at *16-*21.

Taylor v. Continental Group Change in Control Severance Pay Plan, 933 F.2d 1227, 1232 (3d Cir. 1991),

was also a severance agreement case. The Third Circuit stressed that "[s]everance plans are often similar to employment contracts, whose interpretation requires determining the intent of both contracting parties." Again, there was no reservation by the employer of the right to alter or terminate the severance benefits.

When the Third Circuit decided a case similar to this one, it also upheld summary judgment for the employer, rejecting retirees' contract vesting claim based upon the employer's unambiguous reservation of rights. *See In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 898-899, 903-905 (3d Cir. 1995). The Third Circuit cited Eighth Circuit decisions in support of its holding. *Id.* at 904.

In *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 79-80, 84-85 (2d Cir. 2001), the Second Circuit held that the employer's promises of "lifetime" insurance benefits made *before* it adopted a reservation of rights, raised a triable issue whether the benefits were vested for employees who began their employment before the employer reserved its rights. Because NCR's reservation of rights indisputably predates the Early Out Program, *Devlin* is irrelevant.

However, Stearns fails to cite *Devlin's* companion case, *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001), which strongly supports the Eighth Circuit's decision here. In *Abbruscato*, the Second Circuit affirmed summary judgment for the employer as to the contractual vesting claim because the relevant ERISA plan document, although promising life insurance benefits for the "rest of [the employees'] lives," also reserved the employer's right to amend or terminate those benefits.

The facts of this case provide even greater support to NCR. NCR said nothing about "lifetime" benefits in any of the Early Out Program documentation.

Finally, *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.), *cert. denied*, 524 U.S. 923 (1998), strongly supports the Eighth Circuit's decision. Relying on General Motors' reservation of rights, the Sixth Circuit rejected the early retirees' contention that the "statements of acceptance" of early retirement, similar to the Elections in this case, were contracts vesting their health-care benefits. *Id.* at 393-395, 402-403. The Sixth Circuit concluded that the statement of acceptance had incorporated GM's general plan, which included its reservation of rights. *Id.* at 400-401, 403. Moreover, as in *Abbruscato*, the employer prevailed in *Sprague* even though it included statements in its early retirement documentation that the benefits would be provided for the early retirees' "lifetimes." Here, NCR repeatedly said that the health-care benefits were subject to change and were not guaranteed.

III. The Eighth Circuit's Decision Correctly Applies Congressional ERISA Policy.

Not only is the Eighth Circuit's decision in full accord with other Circuits' decisions, it also correctly applies Congressional policy governing ERISA welfare benefit plans. While Stearns argues that the statutory provisions and case law governing such plans must be *ignored* when an ERISA benefit contract is construed (Pet. 12-15), the exact opposite is true. Congress sought to avoid saddling employers with permanent, vested welfare benefits they could no longer afford. To effectuate that policy, courts have required that

any contract concerning such benefits must incorporate all relevant plan documents. As the Second Circuit has explained:

> Congress intended that plan documents and the SPDs [summary plan descriptions] exclusively govern an employer's obligations under ERISA plans. . . .
>
> With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs. While these plaintiffs would be helped by a decision in their favor, such a ruling would not only fly in the face of ERISA's plain language but would also decrease protection for future employees and retirees.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988). Thus, when, as here, the plan includes an unambiguous reservation of rights and no language providing that the benefits will be vested, only one outcome is possible under ERISA: As NCR did in this case, the employer may modify or terminate any or all of the benefits.

Therefore, the Eighth Circuit correctly held that construction of a contract affecting ERISA welfare benefits cannot be based solely on common law contract principles, as Stearns argues, but must apply the policy adopted by Congress in ERISA of preserving the flexibility of employers in exercising their reserved right to change or terminate such benefits.

CONCLUSION

The petition should be denied because it ascribes to the Court of Appeals decisions that it did not make. As a result, the questions purportedly raised by the petition are not properly raised. The "phantom" Eighth Circuit rulings are also the pretext for Stearns' claim of an inter-circuit conflict. In fact, the Eighth Circuit's ruling is in full accord with the decisions of other Circuits. The other Circuits deciding the issue have unanimously held that an unambiguous reservation of rights precludes vesting ERISA welfare benefits. Last but not least, the Eighth Circuit's decision is clearly correct under the undisputed facts, applicable law, and ERISA policy.

Therefore, NCR asks the Court to deny the petition.

Respectfully submitted,

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